Malaysian Oxygen Bhd v Soh Tong Wah and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–3593 OF 2010 AND W-02-3646 OF 2010
ABDUL WAHAB PATAIL, BALIA YUSOF AND MOHAMAD ARIFF JJCA
4 NOVEMBER 2014

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Civil Procedure — Judicial review — Appeal against High Court's dismissal of application for judicial review of Industrial Court's decision — Industrial Court held employee's dismissal was without just cause or excuse as dismissal was too harsh a punishment — Employer/appellant of view dismissal was justified — Whether appellant able to show decision of Industrial Court tainted with illegality, irrationality or procedural impropriety — Whether appellant's mere disagreement with Industrial Court's decision could not be basis for judicial review — Whether High Court in judicial review could not be called upon to re-assess findings of facts made by Industrial Court particularly as to credibility of witnesses

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The two appeals herein, one by Malaysian Oxygen Bhd ('MOX'), and the other by Soh Tong Wah ('Soh') were against the High Court's dismissal of their respective applications for judicial review of a decision by the Industrial Court ruling, inter alia, that MOX had dismissed Soh from its employment without just cause or excuse and should therefore pay him RM1,290,300 as compensation in lieu of reinstatement and back wages. MOX's application for judicial review sought an order of certiorari to quash the Industrial Court's decision on the ground Soh, who was its process gas solutions division general manager, was justly dismissed for misconduct. Soh's judicial review application, on the other hand, was against the quantum awarded to him by the Industrial Court as well as against other prayers which were dismissed. In the instant appeals, the appellate court was, inter alia, implored to re-evaluate the findings of facts by the Industrial Court and to consider whether the punishment of dismissal was too harsh in the circumstances of the case.

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Held, dismissing both appeals with no order to costs:

(1) The test for appellate intervention in an application for judicial review in the context of the instant case was whether there was abuse of power or unfair treatment by the Industrial Court on the grounds of illegality, procedural impropriety, unreasonableness or, possibly, proportionality. This court found there was nothing in the nature of illegality, irrationality or procedural impropriety in the assessment of MOX's case by the Industrial Court. MOX's case in its application for judicial review and in this appeal was that it disagreed with the Industrial Court's finding that

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(Soh's) breach was insufficient to justify his dismissal. Disagreement was no basis for judicial review. The High Court had thoroughly scrutinized the Industrial Court's findings of fact and reasoning for its award before dismissing the application for judicial review. The High Court did not err in doing so. For the same reasons, Soh's instant appeal was also dismissed (see paras 25–28).

(2) Given that judicial review arose from the High Court's supervisory jurisdiction, where the primary orders were certiorari and mandamus, and not from the appellate jurisdiction where the appellate court was cloaked with the jurisdiction of the court appealed from, the High Court could not in certiorari proceedings entertain what was effectively an appeal against findings of fact (see para 23).

(3) The High Court in judicial review was in no position to re-assess a finding of fact, ie an assessment of credibility, including relative credibility of witnesses seen and heard giving testimony and tested on that testimony before the tribunal. If the reasoning in the award showed the finding was made upon an assessment of credibility, with the reasoning not only asserting that it was so made but also setting out the observations, eg the conduct of a witness in the way he behaved, answered questions or a particular question in examination-in-chief or in cross-examination, then the High Court could treat that testimony as any other evidence and give it the weight it deserved (see para 24(b) & (c)).

(4) The Industrial Court was a tribunal with authority placed upon it in the specific context of claims of dismissal without just cause or excuse. Its judgment in industrial labour matters as to whether there was just cause or excuse was therefore not to be lightly disturbed (see para 13).

[Bahasa Malaysia summary

Kedua-dua rayuan ini, satu oleh Malaysian Oxygen Bhd ('MOX'), dan satu lagi oleh Soh Tong Wah ('Soh') adalah terhadap penolakan Mahkamah Tinggi terhadap permohonan masing-masing untuk semakan kehakiman bagi keputusan Mahkamah Perusahaan, antara lain, bahawa MOX telah memecat Soh daripada pekerjaannya tanpa sebab yang adil atau alasan dan oleh itu sepatutnya membayarnya sebanyak RM1,290,300 sebagai ganti rugi sebagai pengganti pemulihan dan upah terdahulu. Permohonan MOX untuk semakan kehakiman memohon satu perintah untuk membatalkan keputusan Mahkamah Perusahaan atas alasan Soh, yang merupakan pengurus am bahagian proses penyelesaian gas, adalah dipecat secara adil untuk kelakuan salah. Permohonan semakan kehakiman Soh, sebaliknya, adalah terhadap kuantum yang diawardkan kepadanya oleh Mahkamah Perusahaan dan juga terhadap pemecatan yang tidak adil dalam situasi kes itu.

Diputuskan, menolak kedua-dua rayuan tanpa perintah kepada kos:

(1) Ujian untuk campur tangan Mahkamah Rayuan dalam permohonan semakan kehakiman dalam konteks kes ini adalah sama ada terdapat penyalahgunaan kuasa atau perlakuan tidak adil oleh Mahkamah Perusahaan atas alasan menyalahi undang-undang, ketidakpantasan prosedur, ketidakmunasabahan atau, kemungkinan, perkadaran. Mahkamah ini mandapati tiada apa dalam keadaan biasa menyalahi undang-undang, tidak rasional atau ketidakpantasan prosedur dalam penilaian kes MOX oleh Mahkamah Perusahaan. Kes MOX dalam permohonannya untuk semakan kehakiman dan dalam rayuan ini adalah bahawa ia tidak bersetuju dengan dapatan Mahkamah Perusahaan bahawa kemungkiran Soh adalah tidak mencukupi untuk menjustifikasikan pemecatannya. Tidak bersetuju bukanlah dasar untuk semakan kehakiman. Mahkamah Tinggi telah meneliti secara menyeluruh dapatan fakta dan alasan Mahkamah Perusahaan untuk awardnya sebelum menolak permohonan semakan kehakiman (lihat perenggan 25–28).

(2) Memandangkan semakan kehakiman timbul daripada bidang kuasa penyeliaan Mahkamah Tinggi, yang mana perintah utama adalah certiorari dan mandamus, dan bukan daripada bidang kuasa rayuan yang mana Mahkamah Rayuan diselubungi dengan bidang kuasa dari mahkamah yang dirayu, Makamah Tinggi tidak boleh dalam prosiding certiorari melayani apa yang secara efektif satu rayuan terhadap dapatan fakta (lihat perenggan 23).

(3) Mahkamah Tinggi dalam semakan kehakiman bukanlah dalam kedudukan untuk menilai kembali dapatan fakta, iaitu menilai kredibiliti, termasuk kredibiliti relatif terhadap saksi-saksi melihat dan mendengar memberi keterangan dan diuji terhadap keterangan di hadapan tribunal. Jika alasan dalam award menunjukkan dapatan dibuat dari penilaian kredibiliti, dengan alasan bukan hanya menegaskan bahawa ia telah dibuat sedemikian tetapi juga menyatakan pemerhatian, contohnya kelakuan saksi dalam bagaimana ia berkelakuan, menjawab soalan-soalan atau soalan khusus dalam pemeriksaan utama atau pemeriksaan balas, hanya dengan itu Mahkamah Tinggi boleh menganggap testimoni sebagai satu lagi keterangan dan memberikan berat yang sepatutnya (lihat perenggan 24(b) & (c)).

(4) Mahkamah Perusahaan adalah tribunal dengan kuasa terletak atasnya dalam konteks yang spesifik terhadap tuntutan pemecatan tanpa sebab dan alasan yang adil. Penghakimannya dalam perkara tenaga kerja industri sama ada terdapat sebab atau alasan yang adil adalah oleh itu tidak boleh diusik dengan mudah (lihat perenggan 13).]

Notes

For cases on judicial review in general, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 5317–5344.

Cases referred to

Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 KB 223, CA (refd)

Council of Civil Service Unions and Other Appellants v Minister for the Civil Service [1983] UKHL 6; [1985] AC 374, HL (refd)

Ellis v Dubowski and another [1921] 3 KB 621 (refd)

Kerajaan Malaysia & Ors v Nasharuddin Nasir [2004] 1 CLJ 81, FC

Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72; [2002] 4 CLJ 105, FC (refd)

R Rama Chandran v Industrial Court of Malaya & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

R v Burnley Justices (1916) 85 LJKB 1565, KB (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

Wheeler v Leicester City Council [1985] UKHL 6; [1985] AC 1054, CA (refd)

William Jacks & Co (M) Bhd v S Balasingam [2000] 7 MLJ 1; [1997] 3 CLJ 235, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 72

Industrial Relations Act 1967 ss 20, 20(2), (3), (4)

Appeal from: Application for Judicial Review Nos R2–25–131 of 2008 and R2–25–135 of 2006 (High Court, Kuala Lumpur)

N Sivabalah (E Reena with him) (Shearn Delamore & Co) in Civil Appeal No W-02–3593 of 2010 for the appellant.

VK Raj (S Devi with him) (P Kuppusamy & Co) in Civil Appeal No W-02–3593 of 2010 for the respondent.

VK Raj (S Devi with him) (P Kuppusamy & Co) in Civil Appeal No W-02–3646 of 2010 for the appellant.

N Sivabalah (E Reena with him) (Shearn Delamore & Co) in Civil Appeal No W-02–3646 of 2010 for the respondent.

Abdul Wahab Patail JCA:

[1] Civil Appeal W-02–3593 of 2010 is the appeal by Malaysian Oxygen Bhd (the appellant) against the decision dismissing its application R2-26–131 of 2008 before the High Court for judicial review of the award by the High Court. It was heard together with an appeal W-02–3646 of 2010 to this Court

by the respondent herein Soh Tong Wah (the respondent) against the decision of the High Court in respect of his application R2-25–135 of 2008 for judicial review, on quantum and other orders that were dismissed by the Industrial Court.

[2] The appeals were heard together on 3 October 2012, at the end of which both appeals were dismissed with no order as to costs.

[3] We address Civil Appeal W-02–3593 of 2010, and Malaysian Oxygen Bhd, the appellant therein as 'the appellant' and Soh Tong Wah, the respondent therein as 'the respondent' in both appeals W-02–3593 of 2010 and W-02–3646 of 2010.

BACKGROUND

[4] The appellant had undertaken investigations into allegations of misconduct made against the respondent, the General Manager of the appellant's Process Gas Solutions Division where the respondent was responsible for the management of all the activities within that division.

[5] Its investigations revealed links between the respondent and two of the appellant's suppliers, Kelington Engineering Sdn Bhd and Just Brilliant Sdn Bhd, which had been awarded substantial contracts by the appellant for purchases.

[6] The respondent was issued with a letter dated 26 May 2003 instructing him to show cause in writing why disciplinary action, including determination of his employment, should not be taken against him in respect of the eight charges levelled therein.

[7] The charges against the respondent were:

(a) Charge 1

> That you, as General Manager - PGS, a senior member of the top management team, have *without the knowledge of or declaration to the Company, formed a company called Empire Gallery Sdn Bhd with your wife, Mdm Kong Foong Ming*, which act is in conflict with the *expressed requirements that you have to devote your whole time and attention* to the service of the Company and not (without the Company's written consent) to engage or become interested in any other gainful trade or business.

(b) Charge 2

That you, as General Manager - PGS, a senior member of the top management team, with duties and responsibilities including procurement and award of tenders, contracts or purchases, have *failed to inform or declare to the Company that your wife, Mdm Kong Foong Ming is a cheque signatory for Corporate Commander Sdn Bhd* which holds a 40% share-holding in Kelington Engineering Sdn Bhd, a supplier and engineering contractor to our Company that was awarded substantial contracts in the years 2001 and 2002 by our Company, which act tantamount to *a breach of your fiduciary duty to the Company and a conflict of interest*.

(c) Charge 3

That you, as General Manager - PGS, a senior member of the top management team, with duties and responsibilities including procurement and award of tenders, contracts or purchases, *have failed to inform or declare to the Company that Wong Kong Meng, the company secretary to your company Empire Gallery Sdn Bhd is a shareholder, director and company secretary of Proline Management Services Sdn Bhd and Proline Tax Management Sdn Bhd which your company uses their services, is also a shareholder (directly or indirectly), director and company secretary of Kelington Engineering Sdn Bhd* that was awarded substantial contracts in the years 2001 and 2002 by our Company, which act tantamount to a *breach of your fiduciary duty to the Company and a conflict of interests*.

(d) Charge 4

That you, as General Manager - PGS, a senior member of the top management team, with duties and responsibilities including procurement and award of tenders, contracts or purchases, *have failed to inform or declare to the Company that Wong Kong Meng, the company secretary to your company, Empire Gallery Sdn Bhd is a shareholder, director and company secretary of Corporate Commander Sdn Bhd and Palace Star Sdn Bhd which are shareholders of Kelington Engineering Sdn Bhd*, that was awarded substantial contracts in the years 2001 and 2002 by our Company, which act tantamount to *a breach of your fiduciary duty to the Company and a conflict of interests.*

(e) Charge 5

That you, as General Manager - PGS, a senior member of the top management team, with duties and responsibilities including procurement and award of tenders, contracts or purchases, have failed to inform or declare to the Company that Wong Kong Meng, the company secretary to your company, Empire Gallery Sdn Bhd is the company secretary of R G Enterprise, which is a shareholder of Kelington Engineering Sdn Bhd, that was awarded substantial contracts in the years 2001 and 2002 by our Company, which act *tantamount to a breach of your*

fiduciary duty to the Company and a conflict of interests.

(f) Charge 6

That you, as General Manager - PGS, a senior member of the top management team, with duties and responsibilities including procurement and award of tenders, contracts or purchases, have failed to inform or declare to the Company that Wong Kong Meng, the company secretary to your company Empire Gallery Sdn Bhd is the company secretary of Just Brilliant Sdn Bhd, that was awarded substantial purchases in the years 2001 and 2002 by our Company, which act tantamount to a *breach of your fiduciary duty to the Company and a conflict of interests*.

(g) Charge 7

That you, as General Manager - PGS, a senior member of the top management team, with duties and responsibilities including procurement and award of tenders, contracts or purchases, have *failed to inform or declare to the Company that your cousin, Sow Chin Tiam, was employed by a supplier to our Company, Just Brilliant Sdn Bhd, in February 1999* and currently is its manager, which company became a supplier to our Company in June 1999 and was awarded substantial purchases in the years 2001 and 2002 by our Company, which act tantamount to a breach of your fiduciary duty to the Company and a conflict of interests.

(h) Charge 8

That you, as General Manager - PGS, a senior member of the top management team, with duties and responsibilities including procurement and award of tenders, contracts or purchases, have *failed to inform or declare to the Company that your brother, Soh Chin Leh, has joined the employment of a supplier to our Company*, Just Brilliant Sdn. Bhd., in January 2003 that was awarded substantial purchases in the years 2001 and 2002 by our Company, which *act tantamount to a breach of your fiduciary duty to the Company and a conflict of interests.*

[8] The appellant sought judicial review for:

(a) an order of certiorari to quash the entire decision of the Industrial Court in its Award No 469 of 2008 dated 17 March 2008 which was received on 25 April 2008;

(b) any other relief that the High Court deems fit and appropriate; and

(c) costs.

[9] It is the appellant's case that:

(a) By his letter 29 May 2003, the respondent did not dispute most of the charges but instead gave his explanation and justification for his conduct.

(b) Notwithstanding the respondent's explanation, the appellant felt it could no longer repose trust and confidence in the respondent, and issued the letter dated 6 June 2003 dismissing the respondent with immediate effect.

(c) The respondent made representations under s 20 of the Industrial Relations Act 1967 to the Minister of Human Resources who referred the representations to the Industrial Court for a decision.

(d) In its Award No 469/2008, the Industrial Court ruled the dismissal of the respondent to be without just cause and excuse and awarded the respondent with compensation in lieu of reinstatement and back-wages totalling RM1,290,300.

(e) The Industrial Court found that the respondent's dismissal from service on 6 June 2003 was too harsh in the circumstances and awarded the respondent backwages and compensation RM1,290,300. See Award No 469 of 2008 dated 17 March 2008 ('the Award').

[10] The High Court dismissed the appellant's application. The appellant appealed to this court.

[11] The question before this court is whether the High Court erred in dismissing the respective appellant's application for judicial review of the award by the Industrial Court. The grounds for the application to the High Court and the appeal to this court is two pronged, that (a) there was error in the evaluation of the evidence; and (b) the award was not proportionate to the wrongs committed by the respondent.

[12] The submissions before the court dwelt on the issues relating to (a) re-evaluation of the findings of fact by the Industrial Court; and (b) whether punishment of dismissal was harsh.

[13] The appeal before this court is an appeal from a dismissal by the High Court of the appellant's application for judicial review of the decision of the Industrial Court. The matter before the Industrial Court arose out of a representation by the respondent under s 20 of the Industrial Relations Act 1967 ('Act 177'), alleging dismissal without just cause or excuse. The matter was referred to the Industrial Court by the Minister exercising his discretion to do so under s 20(3) upon receiving the notification by the Director-General under s 20(2) that he is satisfied that there was no likelihood of the matter being settled. The Industrial Court is not only a tribunal with specific jurisdiction

under Act 177 but it is also provided by s 20(4) that where an award is made by the Industrial Tribunal, the award shall operate as a bar to any action for damages by the workman in any court in respect of wrongful dismissal. Its award is clearly intended by law to be final. It is a tribunal with authority placed upon it in the specific context of claims of dismissal without just cause or excuse. The Industrial Court falls within the mould of the classic tribunal and its judgment in industrial labour matters as to whether there was just cause or excuse is, therefore, not to be lightly disturbed.

[14] In *Associated Provincial Picture Houses, Ltd v Wednesbury Corp* [1948] 1 KB 223, it was held by Lord Greene MR that the court may intervene in judicial review only if the court could conclude that:

(a) In making its decision, the tribunal took into account factors that ought not to have been taken into account, or

(b) the tribunal failed to take into account factors that ought to have been taken into account, or

(c) its decision was so unreasonable that no reasonable authority would ever consider imposing it.

[15] Further down in his judgment, on the question of unreasonableness in judicial review, Lord Greene MR discussed *R v Burnley Justices* (1916) 85 LJKB 1565, and *Ellis v Dubowski and another* [1921] 3 KB 621 and held:

> That is no authority whatsoever to support the proposition that the court has power, a sort of overriding power, to decide what is reasonable and what is unreasonable. The court has nothing of the kind.

[16] This standard of unreasonableness was explained in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* as follows:

> It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably.' Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short v Poole Corporation* [1926] Ch 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be

described as being done in bad faith; and, in fact, all these things run into one another.

[17] Thus, a decision in *Wednesbury* is unreasonable if it is so unreasonable that no reasonable person acting reasonably could have made it. It is a stricter test than merely showing the decision was unreasonable. It must be so unreasonable that it can be described as irrational. In *Council of Civil Service Unions and Other Appellants v Minister for the Civil Service* [1983] UKHL 6; [1985] AC 374 (HL), Lord Diplock explained that 'irrationality' may be referred to as 'Wednesbury unreasonableness':

> It applies to a decision so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system ...

[18] The above explains the standard of unreasonableness that is to be applied.

[19] Reviewing established cases on judicial review, Lord Diplock, in *Council of Civil Service Unions and Others v Minister for the Civil Service,* had categorised the recognised grounds as illegality, irrationality and procedural impropriety, and possibly proportionality. In *Wheeler v Leicester City Council* [1985] UKHL 6; [1985] AC 1054, Lord Roskill, who had sat with Lord Diplock in *Council of Civil Service Unions and Others v Minister for the Civil Service*, held that these three categories of judicial review is neither exhaustive nor mutually exclusive:

> My Lords, the House recently had to consider problems of this nature in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 WLR 1174. In his speech at p 1196 of the report, my noble and learned friend Lord Diplock classified three already well established heads or sets of circumstances in which the court will interfere. First, illegality, second, irrationality and third, procedural impropriety. If I may be forgiven for referring to my own speech in the case, a similar analysis appears on p 1200 of the report. Those three heads are not exhaustive, and as Lord Diplock pointed out, further grounds may hereafter require to be added. Nor are they necessarily mutually exclusive.
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> To my mind the crucial question is whether the conduct of the council in trying by their four questions, whether taken individually or collectively, to force acceptance by the club of their own policy (however proper that policy may be) on their own terms, as for example, by forcing them to lend their considerable prestige to a public condemnation of the tour, can be said either to be so 'unreasonable' as to give rise to 'Wednesbury unreasonableness' (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223) or to be so fundamental a breach of the duty to act fairly which rests upon every local authority in matters of this kind and thus justify interference by the courts.

[20] In *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629 (FC) where the Federal Court followed its decision in *R Rama Chandran v Industrial Court of Malaya & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 held at para 15 of its judgment reproduced below that the distinction between review and appeal no longer holds:

> [15] We find that there is merit on the submission advanced by the learned counsel for the respondent. Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality'. 'irrationality' and possibly 'proportionality' which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.

[21] The statement was made in the context of the unfolding of the nature of judicial review over time through case law where judicial review is no longer confined to flawed process, and the further grounds identified required scrutiny of the decision not only for process but also for substance. Scrutiny for substance was recognised in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72; [2002] 4 CLJ 105 (FC), (followed by the Federal Court in *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2004] 1 CLJ 81 (FC)), Mohamed Dzaiddin FCJ (as he then was) in the Federal Court said that the statement often made that judicial review is concerned not with the decision but the decision making process, at full face value, may well convey the impression that the jurisdiction of the courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected, but in practice, the three grounds set out by Lord Diplock permits the courts to scrutinise such decisions not only for process, but also for substance.

[22] Thus, *Ranjit Kaur S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* cannot be read as having eliminated distinction between judicial review and an appeal entirely.

[23] We observe that given that judicial review arises from the supervisory jurisdiction, where the primary orders are certiorari or mandamus, and not from the appellate jurisdiction where the appellate court is cloaked with the jurisdiction of the court appealed from, the High Court cannot in certiorari proceedings entertain in judicial review what is effectively an appeal against findings of fact (see *William Jacks & Co (M) Bhd v S Balasingam* [2000] 7 MLJ 1; [1997] 3 CLJ 235).

[24] Scrutiny for substance involves examination of findings of fact. The extent to which the court can review findings of fact of a tribunal has the same practical limitations as in an appeal from a trial court:

(a) A primary finding (eg unfair dismissal) at the end of a case is drawn from other secondary facts (eg the various acts of unfairness) which if disputed it itself the subject of a finding of fact drawn from admissible evidence (eg documents, witnesses etc) produced and admitted into evidence before the tribunal.

(b) The High Court in judicial review is in no position to re-assess a finding of fact that is an assessment of credibility, including relative credibility of witnesses seen and heard giving testimony and tested on that testimony before the tribunal. See *Ranjit Kaur S Gopal Singh v Hotel Excelsior (M) Sdn Bhd*.

(c) But unless the reasoning in the award demonstrates that the finding is made upon an assessment of credibility, with the reasoning not only asserting it was so made but also setting out the observations, for example the conduct of the witness in the way he behaves, answers questions or a particular question in examination in chief or in cross-examination, then the High Court can treat that testimony as any other evidence and give it the weight it deserves.

[25] A finding on a secondary fact involves a conclusion drawn from the evidence. A finding of a primary fact involves a conclusion drawn from other facts. Likewise the decision at the end of a case is a conclusion drawn from the application of law to the facts. Conclusions themselves are drawn by a process of reasoning. This is no different in judicial review as from an appeal. The test applied however differs. In an appeal, the test is for intervention is governed by s 72 of the Courts of Judicature Act 1964 ('Act 91'), that no judgment or order of the High Court, or of any judge, shall be reversed or substantially varied on appeal, nor a new trial ordered by the Court of Appeal, on account of any error, defect, or irregularity, whether in the decision or otherwise not affecting the merits or the jurisdiction of the court. Whereas in judicial review, it is whether there was abuse of the power or unfair treatment by the Industrial Court for example illegality, procedural impropriety, unreasonableness or possibly proportionality.

[26] The grounds of judgment of the High Court and the record of appeal by the appellant before this court, demonstrate that the High Court addressed the law at some length to guide it and conducted a thorough scrutiny of the findings of fact and the reasoning by the Industrial Court in arriving at its award, before making its own decision to dismiss the appellant's application for judicial review. The Industrial Court is set up for the purposes of Act 177, an Act to promote and maintain industrial harmony and to provide for the

regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom. This court finds nothing in the nature of illegality, irrationality or procedural impropriety in the assessment of the appellant's case by the Industrial Court. Summed up in one sentence, the appellant's case in its application for judicial review and in this appeal is that it disagrees with the Industrial Court that the breach was insufficient to justify dismissal. Disagreement is no basis for judicial review.

[27] We found, therefore, that the High Court did not err in dismissing the application for judicial review.

[28] For the same reasons, we dismissed the appeal W-02–3646 of 2010 by the respondent.

[29] For the reason that appeals by both parties were dismissed, we made no order as to costs.

Both appeals dismissed with no order for costs.

Reported by Ashok Kumar